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No. 80-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, Petitioner

vs.

LINCOLN ISAAC, Respondent

E.P. PERINI, Petitioner

vs.

KENNETH BELL, Respondent

TED ENGLE, Petitioner

vs.

HOWARD HUGHES, Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR OHIO CRIMINAL DEFENSE LAWYERS ASSOCIATION

AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Ohio Criminal Defense Lawyers Association (formerly Ohio Public Defenders Association) a non-profit organization, was incorporated under the laws of Ohio in 1973. Its purpose is to protect the rights of the accused, provide continuing education for the criminal defense bar, and to improve the criminal justice system. Our membership of four hundred represents all facets of criminal defense work, and includes public defenders, private counsel, law school faculty and law students. The members of the Association represent clients involved in an estimated fifty-five percent of all misdemeanor and seventy percent of all felony cases arising annually in Ohio. With a membership comprising such a substantial percentage of the Ohio criminal bar, the Association is concerned with

the cases at bar and all other cases relating to criminal law and procedure which affect the rights of criminal defendants.

The Association's Amicus Committee has filed briefs in this Court, the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Court, Northern District of Ohio, in other actions which involved the rights of criminal defendants. The Association filed an amicus brief on behalf of respondents in the Court of Appeals below.

The instant cases are of interest to the Association and its members for several reasons. To begin with, they initially arose in Ohio and concern interpretations of Ohio statutory, procedural, and common law. The issues presented by these cases further involve defense counsel's role at trial as an

advocate and what is to be expected of him in terms of objecting to errors which may later be raised in federal habeas corpus proceedings. The resolution of such issues herein will have a direct impact on the daily practice of the members of the Association. In addition, the issues involved in these cases concern what a state defendant who has failed to comply with a contemporaneous objection rule must show in order to obtain relief in a federal habeas corpus proceeding. Finally, other Ohio defendants, similarly situated to respondents herein, are being represented by members of the Association and will be directly affected by the outcome herein.

All parties to these cases have consented to the Association's filing a brief amicus curiae in support of respondents.

SUMMARY OF ARGUMENT

As indicated in Wainwright v. Sykes, 433 U.S. 72 (1977), the primary purpose of a contemporaneous objection rule is to make a trial as free of error as possible. Ohio has no legitimate state interests in demanding compliance with such rule when there was no basis for objection under Ohio law at the time of trial and no realistic possibility of correcting or avoiding the error. Nothing in Ohio law supported a basis for objecting to the jury instructions herein. Thus, Ohio's legitimate state interest in error-free trials would not have been furthered by requiring an objection in such circumstances. Wainwright, at 90, necessarily presumes there is some known, existing basis for an objection at the time of trial.

Even had counsel perceived a basis for objecting, it would have been futile

to object in light of the well-established law. There was no realistic possibility of the trial court going against prior Ohio law. Estelle v. Smith, _____ U.S. _____, 49 U.S.L.W., 4490, 4493 n. 12 (May 19, 1981), supports the conclusion that the futility of an objection will excuse a failure to object.

None of the reasons Wainwright found for the enforcement of state procedural rules are present here. The error involved strictly a legal issue requiring no evidentiary hearing. An objection would not have corrected the error. There was no evidence of "sandbagging" by trial counsel.

Counsel cannot be expected to anticipate future decisions. If he is, his failure to do so would constitute ineffective assistance. If he is not, then his failure to do so would not be ineffective assistance and should be sufficient "cause" for his failure to object.

"Cause" should not be equated with ineffective assistance as it leaves no middle ground between a deliberate bypass and ineffective assistance of counsel for recognizing the human frailties of counsel and that counsel's failure to object may be non-deliberate. There was no strategic advantage in failing to object to the error herein. Counsel further did not perceive the basis for the objection or he would have made it.

Ohio's interpretation of the "cause" requirement of Wainwright is further inconsistent with Estelle v. Williams, 425 U.S. 501 (1976). Estelle implies there is acceptable "cause" for a failure to object when counsel did not perceive the basis for objecting at the time of trial.

The State's interpretation of footnote 8 in Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8, is inconsistent with O'Connor v. Ohio, 384 U.S. 92 (1966),

which refused to bar retroactive application of the Griffin v. California, 380 U.S. 609 (1965) decision due to a failure to object. Lee v. Missouri, 439 U.S. 461 (1979), also supports the argument that counsel cannot be expected to object in anticipation of new decisions setting forth new rules of law.

Since Ohio law provides for review of "plain errors", it has no legitimate state interest in barring federal review of such errors. Wainwright implies that federal habeas courts will review "plain errors". The error herein was "plain error." Requiring respondents to prove their claims of self-defense by a preponderance of evidence, instead of the state being required to disprove them beyond a reasonable doubt, per State v. Robinson (1976), 47 Ohio St. 2d 102, substantially impaired the jury's truth-finding function. The error here went

to the central issue of guilt or innocence and infected the basic fairness of the trial itself. It furthered increased respondents' risk of conviction. An improper definition and placement of the burden of proof critically affects the jury's truth-finding function. Hankerson, 432 U.S. at 243. In such circumstance, retroactive application is imperative. Due process was also violated since the prosecution was not required to prove the absence of self-defense which was essential to prove guilt under Ohio law, as construed by Robinson. Due process requires that Ohio follow the standards it has set up to determine guilt.

The Ohio Supreme Court has refused to consider the above errors as "plain errors". However, since the Ohio courts do review "plain error" in jury instructions, this Court has jurisdiction to

determine if Ohio's action in denying plain error review is, in effect, an avoidance of a federal right. Williams v. Georgia, 349 U.S. 375 (1955). Additionally, because Ohio's application of its "plain error" rule is arbitrary and unreasonable, a federal court is not bound by it and may review and determine what should have been considered "plain error" under Ohio law.

Since the truth-finding function of the jury was substantially impaired, respondents' trials were fundamentally unfair. The writ of habeas corpus is to protect persons from deprivations of liberty in violation of constitutional rights and should be available to remedy such injustices. The state's interest in finality and procedural rules should not take precedence over our societal interest in protecting the innocent by guaranteeing the basic fairness and integrity of

criminal trials. Stone v. Powell, 428 U.S. 465, 491-92 n.31 (1976). Respondents constitutional claims bear directly on their innocence. Broad habeas corpus relief should be available to insure that no innocent person suffers an unconstitutional loss of liberty. Since Ohio has refused to afford respondents a remedy to redress the constitutional errors at their trials, federal habeas corpus relief should be granted.

ARGUMENT

Introduction

This case presents for review several important issues dealing with the availability of the writ of habeas corpus to remedy constitutional errors which were not objected to in the state courts at the time of trial. The error common to respondents' trials involved the courts' requiring respondents to prove their

claims of self-defense by a preponderance of evidence. Subsequent to respondents' trials, in State v. Robinson (1976), 47 Ohio St. 2d 102, this burden of proof was determined to be erroneous. Robinson held that the state had the burden of disproving a claim of self-defense beyond a reasonable doubt once sufficient evidence of it was raised. Id., at 113. Since respondents did not object to such error at their trials, Ohio sought to invoke its contemporaneous objection rule to bar federal review of said error. See Wainwright v. Sykes, 433 U.S. 72 (1977). In this brief, amicus will basically deal with three issues. First, amicus will address whether Ohio's contemporaneous objection rule should bar federal habeas review of respondents' claims under this Court's decision in Wainwright. Secondly, amicus will discuss the particular constitutional errors

involved herein and whether Ohio's contemporaneous objection rule bars federal habeas review of them as "plain errors." Finally, amicus will indicate why the writ of habeas corpus should be available to remedy the constitutional violations herein.

I

A STATE'S CONTEMPORANEOUS OBJECTION RULE SHOULD NOT BAR FEDERAL HABEAS REVIEW OF AN UNOBJECTED TO FEDERAL CONSTITUTIONAL ERROR OCCURRING DURING A STATE TRIAL WHERE THERE IS NO KNOWN EXISTING LEGAL BASIS FOR SUCH OBJECTION AND THE PURPOSE BEHIND SUCH RULE WOULD, IN ANY EVENT, NOT HAVE BEEN SERVED BY A TIMELY OBJECTION.

Under Fay v. Noia, 373 U.S. 391, 439 (1963), state defendants were permitted to raise federal constitutional claims in federal habeas proceedings, despite a state procedural default foreclosing state review, absent a knowing and

intelligent waiver of the claim or a deliberate by-pass of state remedies. The holding of Fay was narrowed in Wainwright v. Sykes, 433 U.S. 72 (1977). Under Wainwright, a state defendant must now show "cause" for his failure to comply with a state procedural rule and "prejudice" resulting therefrom. Id., at 87. While amicus submits respondents have made such a showing herein, it is initially evident that the enforcement of Ohio's contemporaneous objection rule in these cases would not serve any legitimate state interest.

This Court made clear in Wainwright that the primary purpose behind a state's contemporaneous objection rule is to make a trial "as free of error as possible." Id., at 90. Counsel's objection thereby allows the court to avoid or correct such error. Ibid; Henderson v. Kibbe, 431 U.S. 145, 158 (1977) (Burger, C.J.,

concurring). This is the express purpose of the Ohio rule. See State v. Williams (1977), 51 Ohio St. 2d 112. A fortiori, where, as in the instant case, such purpose would not have been furthered, i.e., the error would not have been realistically corrected or avoided, Ohio does not have a legitimate state interest in demanding compliance with such rule or insisting that non-compliance bars federal review of such error. See Henry v. Mississippi, 379 U.S. 443 (1965).

The State of Ohio candidly concedes that nothing in Ohio law supported an objection to the court's charge to the jury on the burden of proof with regard to self-defense. See Brief of Petitioner, 12.[1] To the contrary, the Ohio Supreme Court had stated in State v. Rogers

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[1] Hereinafter cited as Br. of Pet.,....

(1975), 43 Ohio St. 2d 28, 33, albeit in dictum, that under Ohio Revised Code Section 2901.05(A) the burden was on the defense by a preponderance of evidence. This was consistent with the long-standing common law rule in Ohio. See Silvus v. State (1871), 22 Ohio St. 90; State v. Seliskar (1973), 35 Ohio St. 2d 94. As the Court below found, it was only subsequent to trial, when State v. Robinson (1976), 47 Ohio St. 2d 103, was decided that there was any legal basis or authority for objecting to such a charge. (A6). Thus, at the time of the trials herein, there was no basis for counsel, or the court, to perceive the instruction as error. Therefore, even if counsel had objected, there was no realistic possibility that such error would have been corrected or avoided by the trial court. As a result, Ohio's legitimate state interest

in error-free trials is not furthered by requiring an objection in such circumstances. It necessarily follows that federal habeas review of the unobjected to error would not infringe upon such state interest.

Amicus contends the rule of Wainwright necessarily presumes that there is some known, existing federal constitutional basis for an objection at the time of trial. See Myers v. Washington, 646 F.2d 355, 359-360 (9th Cir. 1981). In his opinion for the Court, Mr. Justice Rehnquist wrote:

> If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection. Wainwright, 433 U.S. at 90.

See also, concurring opinion of Mr. Justice White, id., at 99.[2] Indeed, in Wainwright the constitutional basis for objection was well known. As indicated above, such basis was not known at the time of the trials herein.

Even assuming, arguendo, counsel perceived the objection,[3] it would have been futile, as the Court below found, for

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[2] ("Other reasons not amounting to deliberate bypass, such as ignorance of the applicable rules, would be sufficient to excuse the failure to object. . . .")

[3] There is no evidence in these cases that counsel was aware of the basis for an objection. To the contrary, Isaac's counsel told the jury in opening and closing statements that he had the burden of proving self-defense by a preponderance of the evidence (JA10), which indicates he was not aware of such objection. Hughes' counsel's general objection to the court's charge (JA48-50) likewise indicates he was not aware of such objection.

counsel to object in light of the well-established Ohio law. (A6). Amicus agrees that to require an objection under such circumstances would be to require "the doing of a vain act."[4] See United States v. Frady, 636 F.2d 506, 512 (D.C. Cir. 1980). There was simply no realistic possibility of the trial court going against prior Ohio law. Thus, Ohio's legitimate state interest in correcting or avoiding the error would not have been served by an objection. Such conclusion is supported by this Court's recent decision in Estelle v. Smith, _____ U.S. _____ (1981), 49 U.S.L.W. 4490, 4493 (May 19, 1981), in which this Court tacitly found that the futility of an objection would excuse a failure to object. See also, Rummell v. Estelle, 587 F.2d 651,

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[4] This was conclusion of the original three judge panel. (A30).

653-654 n.2 (5th Cir. 1978), aff'd on other grounds, 445 U.S. 263, 267 n.7 (1980).

Moreover, none of the reasons found by the Wainwright Court to justify enforcement of a contemporaneous objection rule are present in the situation at bar. See Myers, 646 F.2d at 359-60. There was no necessity of preserving the testimony of any witnesses when their memories were freshest. Wainwright, 433 U.S. at 88. The error herein was strictly a legal issue. There is also no evidence of "sandbagging" by counsel in hopes of raising such issue for the first time in a federal habeas corpus proceeding. Id. at 89. As indicated above, Isaac's and Hughes' trial counsel were obviously unaware of such error, which negates any possibility of "sandbagging." In addition, amicus submits that diligent defense lawyers will not "sandbag" on legal issues that can be raised on appeal.

See Spritzer, Criminal Waiver and Procedural Default, 126 U. of Pa. Law Rev. 473, 507 n. 178 (1978). On the contrary, it is the experience of amicus that trial counsel will attempt to preserve all legitimate legal issues for appeal to protect his client's interest. It is further important to recognize that most defense lawyers do not stay on their client's cases through federal habeas proceedings, making the possibility of "sandbagging" unlikely in most cases. Yackle, Postconviction Remedies, at 338 n.8 (1981).

Further, a contemporaneous objection herein would not have contributed to either making the trial error-free or to the finality of litigation. Wainwright, 433 U.S. at 88. Even had respondents objected, their objections would have been overruled, and a new trial would have been required in any event. Finally, it is folly to think that the prosecution

would agree to an instruction placing the burden on it to disprove self-defense beyond a reasonable doubt when Ohio law was to the contrary. Id., at 89.

In challenging the decision below, petitioner asserts, on the one hand, counsel should be required to anticipate future decisions to preserve the error for review, and on the other, argues that cause is not shown unless ineffectiveness of counsel is established. Br. of Pet., 13-15. Such reasoning is fallacious. If counsel is required to anticipate future decisions, his failure to do so would presumably render his assistance ineffective. No further showing would be required in order to review the unobjected to error. If counsel is not required to anticipate future decisions, then his failure to do so should not be ineffective assistance and should be sufficient "cause" for his failure to object.

The equation of "cause" with ineffective assistance would render Wainwright a nullity. There would be no need for a showing of "cause" once ineffective assistance is established. Also, it is too plain for argument that a reasonably competent defense attorney cannot be expected to anticipate future decisions, which overrule established law, at the time of trial. See McMann v. Richardson, 379 U.S. 759, 771 (1970). As the District of Columbia Court of Appeals found in an identical situation, "[s]uch a suggestion borders on the absurd." Frady, 636 F.2d at 512. Accordingly, the failure to object for lack of anticipation should not be considered ineffective assistance. Petitioner's analysis leaves no middle ground between a deliberate bypass, see Fay, 372 U.S. at 439, and ineffective assistance for recognizing the human frailties of counsel and that a

reasonably competent attorney may fail to object for reasons that are not deliberate and do not necessarily render his assistance ineffective.

To be sure, the lower courts have found "cause" for reasons that fall short of a Sixth Amendment violation.[6] Moreover, some lower courts have found "cause" for counsel's lack of objection where he failed to anticipate a future decision. Myers, 646 F.2d at 360; Robertson v. Warden, 466 F. Supp. 262, 268 (D. Md. 1979); Graham v. Maryland, 454 F. Supp.

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[6] See Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978) (inexperience, inattention, or lack of knowledge of the law sufficient cause); Collins v. Augur, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (lack of knowledge of law or facts sufficient cause); Jurek v. Estelle, 593 F.2d 672, 683 n.19 (5th Cir. 1979) (serious misfeasance is sufficient cause), reh. en banc, 623 F.2d 929 (5th Cir. 1980); Harris v. Spears, 606 F.2d 639 (5th Cir. 1979) (inadvertent mistake, neglect, or press of circumstance sufficient cause).

643, 648 (D. Md. 1978); see also Frady, 636 F.2d at 512. If Wainwright was designed to encourage compliance with state procedural rules, such purpose is clearly not served by imposing a forfeiture when a reasonably competent attorney could or would not have complied. Yackle, Postconviction Remedies, at 350; Pedrero v. Wainwright, 590 F.2d 1383, 1390 n.5, cert. den., 444 U.S. 943. Candor compels the conclusion that the Robinson decision was a new ruling, and trial counsel prior to it were justified in assuming the prior law to be valid. See Griffin v. Illinois, 351 U.S. 12, 25 (1956) (Frankfurter, J., concurring).

Nor does finding "cause" under the circumstances herein return Wainwright to the deliberate by-pass standard of Fay, 372 U.S. at 439. There is absolutely nothing strategic or tactical about failing to object due to ignorance or

lack of anticipation. Such acts or omissions by counsel are clearly non-deliberate and have nothing to do with strategy. Furthermore, there was no strategic advantage to be gained by respondents by failing to object. Rather, they had a substantial advantage to be gained by having the prosecution be required to disprove their claims of self-defense. It is only reasonable to conclude that counsel did not perceive such objection or else he would have made it. Therefore, counsel's failure to object cannot be considered a strategic or tactical maneuver.

Ohio's interpretation of the "cause" requirement of Wainwright is further inconsistent with Estelle v. Williams, 425 U.S. 501 (1976). Estelle held that a defendant could not be compelled to stand trial in prison clothes, but such claim could not be raised on appeal where

counsel was fully aware of it and there was not sufficient reason to excuse his failure to object. Id., at 512-513. Although Estelle was pre-Wainwright, it is quite instructive as to what is sufficient "cause" for a failure to object. The Court pointed out that counsel's failure to raise the issue in Estelle "did not result from any lack of appreciation of the issue," id. at 510, and that "[p]rior Texas cases had made it clear that an objection should be imposed." Id., at 511-512. Mr. Justice Powell, concurring, described counsel's failure to object as an "inexcusable procedural default" where an objection could have protected a substantive right. Justice Powell further noted that counsel could not claim a new issue was involved, as is the situation herein. Id., at 513-514. Amicus submits Estelle necessarily implies that there is acceptable cause for

counsel's failure to object when counsel did not perceive a basis for objecting and in fact no such basis existed at the time of trial which would have permitted the trial court to avoid the error.

The State of Ohio relies most heavily on a footnote in Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977), which indicates that states may deny the benefits of a retroactive change in the law by invoking a contemporaneous objection rule. However, as the panel opinion below noted, that issue was not before the Hankerson Court. (A27). In any event, the state's interpretation of the Hankerson footnote is not supported by precedent.[7] To begin with, it is

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[7] See Hill, The Forfeiture of Constitutional Rights In Criminal Cases, 78 Columbia Law Rev. 1050, 1079, n.160 (1980). Professor Hill states that "this writer cannot believe that the solution proposed in the Hankerson dictum will long commend itself to the Court." Hill further states such

inconsistent with O'Connor v. Ohio, 385 U.S. 92 (1966). In O'Connor, the Court considered whether the defendant's failure to object to a Griffin v. California, 380 U.S. 609 (1965), violation could bar him from asserting such claim subsequent to Griffin. Holding that O'Connor could not be barred, this Court said,

> "Defendants can no more be charged with anticipating the Griffin decision than can the States."

See also, Smith v. Yeager, 393 U.S. 122 (1968). That O'Connor is still sound precedent is evident in this Court's recent per curiam decision in Lee v. Missouri, 439 U.S. 461 (1979). Lee held the retroactive benefits of Duren v.

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dictum was couched in such broad terms that it suggests fatal consequences for procedural defaults generally, and that such view is incompatible with the decisions leading to Wainwright. Ibid.

Missouri, 439 U.S. 357 (1979), to be available only to those habeas petitioners who objected in cases where the jury was sworn subsequent to the decision in Taylor v. Louisiana, 419 U.S. 522 (1975), absent a showing of "cause" for such procedural default. Id., at 462. However, the Court noted that Duren did not "announce" any 'new standards' of constitutional law not evident from the decision in Taylor v. Louisiana. . . ." Ibid. Thus, counsel could be expected to object where he had a fair cross section claim subsequent to the announcement of the new constitutional standard in Taylor. Ergo, where a completely new rule of law has not yet been announced, counsel cannot be expected or required to object in anticipation of such decision. Indeed, it would make a mockery of a decision holding a new rule of law to be retroactive if an accused could only benefit from it by having objected. See

Hill, 78 Colum. Law Rev. at 1078, n.160. "Cause" for counsel's failure to object is apparent in such situations.

II.

OHIO'S CONTEMPORANEOUS OBJECTION RULE DOES NOT BAR STATE OR FEDERAL HABEAS REVIEW OF "PLAIN ERRORS" WHICH DENY AN ACCUSED A FUNDAMENTALLY FAIR TRIAL.

Ohio law expressly provides for the review of plain errors affecting substantial rights, notwithstanding a failure to object. Rule 52, Ohio Rules of Criminal Procedure. In doing so, Ohio concedes it has no legitimate interest in barring state or federal review of such plain or fundamental errors which occur at trial.[8] Like its federal counterpart, the plain

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[8] The above-discussed Hankerson dictum would of course not apply where the state does not bar review of an unobjected to error.

error rule under Ohio law is to be invoked "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." State v. Long (1978), 53 Ohio St. 2d 91, 97. Thus, there is no adequate and independent ground under Ohio law to bar federal review of "plain errors" which occur at trial.

Indeed, such "plain error" rule is entirely consistent with Wainwright that the "cause and prejudice" standard

> "will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."

Wainwright, 433 U.S. at 91. See also, concurring opinions of Justice Stevens, id., at 97 (would permit collateral attacks where the trial violated standard of fundamental fairness); and Justice White, id., at 99 (would review "plain error");

Estelle, 425 U.S. at 514 n.2 (Powell, J., concurring) (discretion might be exercised to reverse conviction on plain error principles); County Court of Ulster County v. Allen, 442 U.S. 140, 151 n.10 (1979).[9]

To argue, as the state does herein, see Br. of Pet., 11-12, n.6, that a state's "plain error" rule does not overcome its contemporaneous objection rule, is to really deny that it is an exception to it, which it plainly is. The state's argument further overlooks the basic premise of the Wainwright rule:

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[9] Several lower court decisions indicate that "plain errors" under State law can be reviewed in federal habeas proceedings despite a failure to object. Berrier v. Egeler, 583 F.2d 515 (6th Cir. 1978), cert. denied, 439 U.S. 955; Canary v. Bland, 583 F.2d 887 (6th Cir. 1978); Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979), cert. denied, 444 U.S. 936; Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978); Krzeminski v. Perini, 614 F.2d 121 (6th Cir. 1980); Carr v. Alabama, 586 F.2d 462 (5th Cir. 1978); Cf., Hockenbury v. Sowders, 633 F.2d 443 (6th Cir. 1980).

that there is some legitimate state interest furthered by its application. With respect to "plain errors," there is none. Furthermore, cutting off federal collateral review of "plain errors" under state law gives greater preclusive effect to procedural defaults by state defendants than to similar defaults by federal defendants. Cf., Francis v. Henderson, 425 U.S. 536 (1977); Kaufman v. United States, 394 U.S. 217, 228 (1969). Ohio's contention, which would result in such unequal treatment of the collateral claims of state and federal defendants, is patently unreasonable, unfair and should be rejected. Francis, at 541-542. See Kinnamon, Defenses To The Preclusive Rule of Wainwright v. Sykes, 28 Drake Law Rev. 571, 590 (1979).

Turning to the error in the present cases, amicus submits it constituted "plain error" and resulted in a miscarriage

of justice to respondents. Respondents were tried and convicted under an improper burden of proof. Respondents were required to prove their defenses of self-defense by a preponderance of evidence. The Ohio Supreme Court's subsequent decision in State v. Robinson (1976), 47 Ohio St. 2d 103, held retroactive in State v. Humphries (1977), 51 Ohio St. 2d 95, makes clear that such burden was improper. Under Robinson, at 108, 113, a defendant is only required to present sufficient evidence to raise such defense and then the prosecution has the burden of disproving it beyond a reasonable doubt. See also, Humphries at 101. Because the state was not required to carry such burden, respondents were denied due process of law and a fair trial.

Of course, the test in a federal habeas proceeding is whether the erroneous instruction "so infected the entire trial

that the resulting conviction violates due process." Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Amicus submits it is manifestly evident that the error herein went to the central issue of guilt or innocence and infected the basic fairness of the trial itself. See Berrier v. Egeler, 583 F.2d at 522.

This fundamental error in the burden of proof substantially impaired the jury's truth-finding function and its ultimate determination of guilt or innocence. It is clear that where the burden of proof lies may be decisive of the outcome. Speiser v. Randall, 357 U.S. 513, 525 (1957). The State even concedes this. Br. of Pet., 22. Where the prosecution must bear a lesser burden of proof, the risk of factual errors that result in convicting the innocent is far greater. In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Where, as

herein, the burden is on the accused, rather than the prosecution, to prove the critical fact in dispute, the risk of convicting an innocent person is even greater. See Berrier, at 522. If the function of legal process is to minimize the risk of erroneous decisions, Addington v. Texas, 441 U.S. 418, 423, such result cannot be tolerated. In a criminal case, such risk to a defendant must be minimized as much as possible. Addington, id., at 425. Due process is clearly not achieved where, as here, the risk of an erroneous decision is increased by the improper allocation of the burden of proof. See Frady, 636 F.2d at 513-514.

Hankerson v. North Carolina, 432 U.S. 233, 243 (1977), expressly recognizes that an improper definition and placement of the burden of proof critically affects

the truth-finding function of the jury.[10] Moreover, it is important to realize that the jury's truth-finding function in Hankerson was impaired in exactly the same manner as in the instant case. Hankerson, like respondents, was improperly required to prove his claim of self-defense by a preponderance of evidence. Id., at 238. A subsequent decision of the North Carolina Supreme Court held that such burden of proof was improper; and that the prosecution, per Mullaney v. Wilbur, 421 U.S. 684 (1975), had the burden of disproving such claim of self-defense beyond a reasonable doubt. Ibid. This Court reversed the North Carolina Supreme Court's refusal to hold Mullaney retroactive. In doing so, this Court necessarily recognized that the factfinding function

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[10] See Judge Celebreeze's concurring opinion in panel decision below. (A34).

of the jury had been substantially impaired which raised serious questions about the accuracy of the verdict. Id., at 243. The only difference between respondents' situation and Hankerson's is that the Ohio Supreme Court's redefinition of the burden of proof was on statutory grounds, and the North Carolina Supreme Court's was on constitutional grounds. Nevertheless, as Judge Celebreeze, concurring in the panel decision below, stated

> Redefining the burden of proof placed upon a defendant, whether it be by a new constitutional rule or by a new statutory interpretation of constitutional dimension, has a substantial impact upon a criminal trial's truth-finding function. In such situations, retroactive application is imperative. Hankerson, supra, at 241 quoting Ivan V., v. City of New York, 207 U.S. 203, 204-05 (1972). (A34-35).

At least one Ohio court has recognized this with respect to the error herein:

> To properly decide a criminal case, it is essential that the jury has a clear understanding of which party has the burden of proof. Without such an understanding, the jury cannot possibly properly perform its function. When in a criminal case the trial court erroneously places the burden of proof on the defendant, that error affects substantial rights of the accused and affects the basic fairness, integrity and public reputation of the judicial process. Such an error is plain error. . . .

State v. Gideons (1977), 52 Ohio App. 2d 70, 78. Cf., State v. Long; see also United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977).

The erroneous instruction herein also violated due process in another way. Under Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977), the state was required to prove all facts essential to guilt under Ohio law. Petitioner contends that the affirmative defense of self-defense is a

device of confession and avoidance and represents a collateral matter to be determined wholly independent of the elements of the crime. Br. of Pet., 18. See State v. Poole (1973), 33 Ohio St. 2d 18, 19. Even assuming, arguendo, this to be true prior to 1974,[11] Ohio Revised Code Section 2901.05, as interpreted by Robinson, clearly changed Ohio law in this respect. Robinson made clear that once sufficient evidence of self-defense was introduced at trial, guilt could not be found unless the prosecution proved the absence of self-defense beyond a reasonable doubt.

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[11] Amicus will not address this issue, but would agree with counsel for respondents Bell and Hughes that even prior to 1974 the claim of self-defense negated a fact necessary for proof of a crime, i.e., unlawfulness. See State v. Silvus, 22 Ohio St. at 99. To hold otherwise is to presume the lawful act of self-defense to be unlawful unless the accused rebuts such presumption by the requisite degree of proof for establishing self-defense.

Instead of self-defense being a collateral matter, it effectively bore a necessary relationship to proving the elements of the crime. Cf., Patterson, 432 U.S. at 205-207. Thus, under Ohio law, as construed by Robinson, a necessary fact essential to guilt, where there was sufficient evidence of self-defense, was that the accused did not act in self-defense. In other words, the state could not prove the crimes with which respondents were charged and treat them as guilty parties unless it disproved their claims of self-defense beyond a reasonable doubt. Because the state was not required to do this in the cases at bar, respondents' due process rights were violated.

The prosecution's burden of proof under Ohio law, as construed by Robinson, was effectively no different than if Ohio law had required it to disprove

self-defense as an element of the crime. Cf., Hankerson, 432 U.S. at 238. Because Ohio chose to impose such burden as a matter of statutory interpretation rather than as an element of the crime should make no difference in terms of due process. A fair and proper determination of guilt or innocence according to the correct standards is essential to due process in any jurisdiction. To permit Ohio to convict individuals when it has not followed its own standards for determining guilt violates fundamental due process.

Unfortunately, the Ohio Supreme Court has refused to consider the above due process violations as "plain errors." State v. Long, 53 Ohio St. 2d at 97. Nevertheless, the Ohio state courts do review "plain error" in jury instructions. Krzeminski, 614 F.2d at 123 n.2; State v. Muscatello (1977), 57 Ohio App.2d 231, 240, aff'd (1978) 55 Ohio St. 2d 201.

Thus, Ohio's discretionary decision to deny that "plain error" exists does not deprive this Court of jurisdiction to review the issues herein since this Court may properly determine if Ohio is, in effect, avoiding consideration of a federal right. Williams v. Georgia, 349 U.S. 375, 383, 389 (1955).

In addition, the Ohio Supreme Court has construed its "plain error" standard to require a showing that, but for the error, the outcome of the trial would clearly have been otherwise. Ibid. Amicus submits that such a standard is so virtually impossible to meet that it is wholly illusory. To speculate on how the jury would have decided guilt or innocence had proper instructions been given invites sheer speculation of the highest order. It further requires the appellate court to engage in a factfinding function which only the jury, and not the court, can

perform.[12] In view of this, amicus submits Ohio's interpretation and application of its "plain error" rule has been arbitrary and unreasonable, at least with respect to the errors involved herein. However, a federal court is not bound by state rules of procedure that are unreasonably or arbitrarily implied. Henry v. Mississippi, 379 U.S. 443 (1965). Therefore, the federal courts below properly reviewed and determined what otherwise should have been considered "plain errors" under Ohio law.

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12 Such logic is even supported by Ohio Supreme Court precedent. See State v. Nelson (1973), 36 Ohio St. 2d 79, 85.

III

WHERE THE JURY'S TRUTH-FINDING FUNCTION IN THE DETERMINATION OF GUILT OR INNOCENCE HAS BEEN SUBSTANTIALLY IMPAIRED BY AN IMPROPER BURDEN OF PROOF, RAISING SERIOUS QUESTIONS ABOUT THE ACCURACY OF SUCH VERDICT, THE GREAT WRIT OF HABEAS CORPUS SHOULD BE AVAILABLE TO REMEDY SUCH INJUSTICE, DESPITE THE ACCUSED'S FAILURE TO OBJECT.

From the above discussion, it is apparent that the truth-finding processes of respondents' trials were substantially impaired. As a result, respondents' trials were fundamentally unfair and the reliability of the jury verdicts is questionable. In such circumstances, the Great Writ must be available to remedy such injustice. To be sure, the historic office of the writ of habeas corpus has been to protect persons from deprivations of liberty in violation of constitutional guarantees. Fay v. Noia, 373 U.S. at

401-402, 412, 426; Blackledge v. Allison, 431 U.S. 63, 72 (1977). While Wainwright narrowed the channel through which defaulting state defendants must pass, this Court did not retreat from this basic principle. The State of Ohio would have the Court do so in this case.

This case therefore presents the fundamental question of whether a state's interest in finality and procedural rules should take precedence over our societal interest in protecting the innocent by guaranteeing the basic fairness and integrity of criminal trials. Amicus submits it should not. The constitutional violations herein bear directly on an accused's innocence and therefore the basic justice of his incarceration. Stone v. Powell, 428 U.S. 465, 491-492 n.31 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 256-266 (1973) (Powell, J., concurring). The question of guilt or

innocence is clearly the central concern in a criminal trial. Stone, at 490. Errors which substantially affect that determination impugn the basic fairness and integrity of a criminal trial.

When constitutional claims bearing on innocence are involved, this Court has stated that broad habeas corpus relief should be available to provide the added assurance that no innocent person suffers an unconstitutional loss of liberty. Id., at 491-492 n.31; see also, Schneckloth, 412 U.S. at 256-266 (Powell, J., concurring). Our societal interest in protecting the innocent through the guarantee of a fair trial surely must predominate over notions of finality and state procedural concerns. See Hill, 78 Colum. Law Rev. at 1076-79. Indeed, this Court acknowledged as much in Wainwright, 433 U.S. at 91, when it stated that federal review of constitutional claims involving a miscarriage of justice

would not be precluded by procedural defaults.

Amicus certainly does not question that comity and federalism require that state procedural rules be accorded some significance. But to exalt notions of finality and formalistic rules over safeguarding the basic integrity and fairness of criminal trials plainly defeats the ends of justice and the ultimate search for truth. As Mr. Justice Powell said in his concurring opinion in Schneckloth, at 412, sacrificing finality and state procedural concerns in such circumstances should be accepted as a "tolerable price to pay for cherished standards of justice."

From the above, it is evident that Ohio has refused to provide a remedy for the federal constitutional violations

occurring during respondents' trials.[13] Under such circumstances, respondents only remedy is in federal habeas corpus. If the Great Writ is to continue to serve its historic purpose, relief must be granted respondents. As this Court said in Fay, at 441:

> Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to lanquish in prison.
> * * *
> For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty

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[13] At least in Ohio, Wainwright, 433 U.S. at 89, has clearly not had its intended effect of making state courts less stringent in the enforcement of contemporaneous objection rules.

to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization.

CONCLUSION

For the foregoing reasons, amicus submits that the judgments and decisions of the Court of Appeals in these cases should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that three copies of the foregoing Brief For Ohio Criminal Defense Lawyers Association as Amicus Curiae In Support Of Respondents has been served on petitioners Ted Engle and E. P. Perini by forwarding such copies to the office of their counsel, Simon B. Karas, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215; and on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the office of their respective counsel, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The

University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this _____ day of August, 1981. I further certify that all parties required to be served have been served. The petitioners' addresses are Ted Engle, Superintendent, Chillicothe Correctional Institute, Post Office Box 5500, Chillicothe, Ohio 45601; E. P. Perini, Superintendent, Marion Correctional Institution, Post Office Box 57, Marion, Ohio 43302. The respondents' addresses are Lincoln Isaac, 310 Roy Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, Post Office Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 43302.

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